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In The
Supreme Court of the United States

SENATOR MITCH McCONNELL, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE STATES OF IOWA, VERMONT, CONNECTICUT, ARIZONA, COLORADO, ILLINOIS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MAINE, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW YORK, OKLAHOMA, RHODE ISLAND, WASHINGTON, WISCONSIN, AND THE COMMONWEALTH OF PUERTO RICO AND THE U.S. VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

The Amici States* bring two unique interests to this litigation. First, the States as sovereigns have an abiding interest in the constitutional principles that govern the regulation of elections and campaign finance. Amici bear substantial responsibility for conducting and policing elections. The very legitimacy of state governments is implicated when citizens lose faith in their elections and elected officials. To combat this, virtually every State in the Union has pursued different types of campaign finance reform in a continuing effort to ensure the integrity of our democratic processes. Just as *Buckley v. Valeo*, 424 U.S. 1 (1976), has framed the debate on campaign finance legislation at both the state and federal level for the last quarter-century, the decision in this case will also have a profound impact on both state and federal election law for many years to come.

Second, as dual sovereigns and partners in our federal system, the Amici have a keen interest in protecting the proper division of power between the federal and state governments. The plaintiffs in this litigation contend that Congress has overstepped its bounds in the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA" or "the Act"). Yet, at the same time that plaintiffs complain about federal legislation encroaching on the States, they ask this Court to adopt a restrictive interpretation of the First Amendment that would call into question both state and federal campaign finance laws. The Amici States disagree strongly with the

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* Joined by the Commonwealth of Puerto Rico and the U.S. Virgin Islands.

federalism arguments advanced by the plaintiffs in this case. The potential threat to state authority in this context comes not from Congress but from plaintiffs' theory of the First Amendment, which, if adopted, would greatly limit the ability of the States to enact meaningful campaign finance reforms.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted BCRA, it recognized that significant campaign finance reform was essential to the health of our national democracy. Although the plaintiffs posit that the Act's key provisions violate the First Amendment and exceed Congress's authority, they are mistaken. BCRA is a constitutional exercise of Congress's power to regulate federal elections and ensure the integrity of federal officeholders.

The Amici States are particularly troubled by the plaintiffs'[1] effort to derail Congress's crucial reform effort by invocation of "federalism." The Amici have a special expertise in the area of federalism, and they pay close attention to the constitutional division of authority between the federal and state governments. In the view of Amici, the plaintiffs' federalism arguments are wholly unsupportable.

Congress has broad authority to regulate activities that bear a reasonable relationship to federal elections. The Court has long recognized the power delegated to Congress, *see* U.S. Const. art. I, § 4, to prescribe regulations for federal elections and to protect the integrity of federal officeholders. BCRA is tailored to reach those campaign activities that are subject to federal regulation – and to reach no further.

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[1] In this context, "plaintiffs" refers to appellants/cross-appellees "Senator Mitch McConnell et al.," and the "political parties." The briefs filed by these two sets of plaintiffs devote substantial space to arguing that certain elements of BCRA exceed Congress's authority, violate the Tenth Amendment, or otherwise run afoul of principles of federalism. *See* Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 26-35; Br. of Political Parties at 78-91.

Congress has not exceeded its delegated constitutional authority and has not regulated purely local matters or intruded on the sovereignty of the States.

Eliminating the corrupting influence of soft money in federal elections does not intrude on state power but, to the contrary, benefits both the States and their citizens. The States and their citizens rely on the integrity and fidelity of federal office holders. Just as importantly, state and local governments suffer from the disaffection and alienation caused by the perception that, in politics, "money talks." Even more than the federal government, state and local governments depend upon an active, engaged citizenry to share in the work of governing. By addressing the causes of alienation and cynicism, BCRA will foster participation and political discourse at both the state and federal level.

The combination of First Amendment and federalism arguments advanced by the plaintiffs is troubling for another reason. Because the States share with Congress the responsibility for ensuring the integrity of elections, the Court's decision in this case will not only decide the fate of BCRA. It will also govern the actions of state legislators across the nation as they pursue efforts to regulate and reform the financing of elections. Although plaintiffs assert allegiance to principles of federalism, they do not truly seek to preserve the authority of the States to legislate in this area. Rather, they seek a constitutional ruling from this Court that would limit state campaign finance laws and preclude state innovation and experimentation. This Court should not adopt such a restrictive view of the First Amendment. The political branches at the state and federal level should be

afforded the latitude they need to protect the integrity of their respective electoral processes.

ARGUMENT

I. BCRA Is A Constitutional Exercise Of Congress's Authority To Regulate Federal Elections And Federal Officeholders.

In our federalist system of government, the federal and state governments share the authority to govern. As a result, the States retain substantial sovereign powers. *See, e.g., Printz v. United States*, 521 U.S. 898, 918-19 (1997) (Constitution establishes a system of dual sovereignty, in which the States retain a "'residuary and inviolable sovereignty'") (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)). As intended by the Founders, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991), the States guard those powers against encroachment by the federal government. But not *all* powers of governance have been – or should be – reserved to the States. The Constitution rightly assigns certain powers to Congress, including the power to regulate federal elections and protect the integrity of federal officeholders. *See* U.S. Const. art. I, § 4; *Burroughs v. United States*, 290 U.S. 534, 545 (1934). BCRA falls comfortably within this authority granted to Congress.

The "federalism" challenges to portions of the Act, raised by plaintiffs and some of their amici, are misplaced. First, plaintiffs' cramped view of Congress's authority is inconsistent with this Court's precedents. Congress may regulate activities that bear a reasonable relationship to federal elections and may pass legislation designed to protect the integrity of federal officeholders. The power of Congress in this area is not automatically limited by the unavoidable impact such regulations may have on state and local

elections. Second, BCRA does not exceed the authority granted to Congress. Each of the challenged provisions of the Act regulates activities related to federal elections and federal officeholders. Finally, BCRA does not "federalize" the conduct or the financing of state elections. Congress carefully tailored BCRA to reach activities that are related to federal elections and officeholders while leaving intact the sovereign authority that States exercise over state and local elections.

A. Congress has the power to regulate matters related to federal elections and to ensure the integrity of federal officeholders.

As the necessary starting point for the analysis of the power of Congress to enact BCRA, the Court must first establish the scope of federal authority in this area. Much of this work has already been done, however. The Court's precedents establish that Congress has broad authority to regulate matters relating to federal elections, as well as activities that pose a risk of corrupting or appearing to corrupt federal candidates and officeholders.

It is not surprising that by the time of *Buckley v. Valeo* the Court described the power of Congress to regulate federal elections as "well-established." 424 U.S. 1, 13 (1976). Well over one hundred years ago, the Court acknowledged that Congress has "a general supervisory power over the whole subject" of federal elections. *Ex parte Siebold*, 100 U.S. 371, 387 (1879). Congress unquestionably may provide a "complete code for [federal] elections," including "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the

fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). The power of Congress in this area is not circumscribed or narrow; rather, "[t]he power of Congress . . . is paramount, and may be exercised at any time, and to any extent which it deems expedient." *Siebold*, 100 U.S. at 392.

Numerous decisions of the Court confirm that this "paramount" authority of Congress includes the power to ensure the integrity of federal elections and officeholders and to legislate against the potentially corrupting influence of money in politics. The reasoning of the Court in *Ex parte Yarbrough*, 110 U.S. 651, 657-58 (1884), still has force today: "If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption." Similarly, in *Burroughs v. United States*, the Court found no doubt that Congress had the power "to pass appropriate legislation to safeguard [a presidential] election from the improper use of money." 290 U.S. at 545. To say otherwise would "deny to the nation in a vital particular the power of self-protection." *Id.*; *see also Buckley v. Valeo*, 424 U.S. at 257(acknowledging the authority of Congress to "protect the elective processes against the 'two great natural and historical enemies of all republics, open violence and insidious corruption'") (White, J., concurring in part and dissenting in part) (quoting *Yarbrough*, 110 U.S. at 658).

The plaintiffs largely disregard the substantial body of case law supporting the authority of Congress to regulate federal elections. Indeed, they fail to

acknowledge or articulate any standard for measuring the extent of Congress's authority to regulate federal elections. Instead, plaintiffs merely assert that Congress lacks the power to regulate state elections. *See* Br. of Political Parties at 79, 81-82; Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 27-30. In so doing, plaintiffs ask and answer the wrong question. The issue posed in this case is not whether Congress may regulate state elections, but whether Congress may regulate federal elections and officeholders in a manner that may affect some state and local campaign activity.

Once properly posed, to paraphrase Justice Miller, the 'question answers itself.' *Cf. Yarbrough*, 110 U.S. at 662. Given the concurrent timing of federal and state elections in most jurisdictions, it would be impossible for Congress to act *without* having some impact on state elections.[2] In *Siebold*, the Court acknowledged as much, declaring that a State's decision to hold concurrent elections does not deprive Congress "of the right to make regulations in reference to [federal elections]." 100 U.S. at 393. The Court suggested that the power of Congress might not extend to matters "having *exclusive* reference to the election of State or county officers," *id.* (emphasis added), thus implicitly recognizing that Congress does have primary authority over matters of shared federal and state interest. In *Yarbrough*, the Court once again rejected the argument that a concurrent state election in any

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[2] The impact of federal regulations on state and local campaign activity is longstanding. Prior to BCRA, federal law required the political parties to allocate their spending for many campaign activities between federal and nonfederal dollars. *See* 11 C.F.R. § 106.5 (2002).

way diminishes the authority of Congress to regulate the federal election. 110 U.S. at 661-62. Neither *Siebold* nor *Yarbrough*, nor any of the Court's precedents, support the proposition that Congress must refrain from regulating matters related to federal elections and officeholders whenever those regulations could also impact state and local campaign activities.

That is not to say that the power of Congress to regulate elections is so unfettered that it could swallow up the concomitant authority of States. In other areas, the Court has been hesitant to adopt expansive views of Congressional authority that would effectively remove "any limitation on federal power." *United States v. Lopez*, 514 U.S. 549, 564 (1995); *see also United States v. Morrison*, 529 U.S. 598 (2000). BCRA does not raise this concern, however, because it does not depend upon an expansive interpretation of federal power. As argued below, the Act reaches only those activities that are related to federal elections and officeholders, and it does not intrude on state sovereignty. BCRA thus respects the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18.

B. BCRA is an appropriate exercise of Congress's authority to regulate federal elections.

Once the scope of Congress's authority to regulate federal elections and protect the integrity of federal officeholders is understood, plaintiffs' federalism arguments are easily dismissed. Plaintiffs suggest that BCRA regulates matters unconnected to federal elections and undermines the authority of States to regulate state and local elections. They consistently

overstate the impact on state elections while minimizing the clear basis for federal authority over the regulated activities. The few specifics they cite illustrate the weakness of their arguments.

The national party "soft money" ban. Title I of BCRA prohibits the national parties from raising and spending any nonfederal money. BCRA, tit. I, sec. 101(a), § 323(a), 116 Stat. at 82. Plaintiffs complain that Congress exceeded its authority under the Elections Clause by prohibiting national parties from raising or spending soft money for nonfederal purposes, such as supporting candidates for state and local offices. The record in this case, however, demonstrates the significant federal interest in curtailing the ability of the national parties to raise and spend soft money. Close ties exist between the national party committees and the elected federal officials who run the committees and raise significant sums of soft money on their behalf. *See, e.g.*, Kollar-Kotelly, 548sa-562sa; Leon, 1243sa-1247sa. The record illustrates the manner in which soft money donations to the national parties gain access for donors to federal candidates and officeholders. *See, e.g.*, Leon, 1265sa-1271sa (lobbyists, former Members of Congress, business leaders, and donors believe that soft money donations to the parties increase access to officeholders); *id.* 1271sa-1276sa (party donation programs show that increased access corresponds with larger donations); Kollar-Kotelly, 567sa (evidence shows that large contributions provide donors access to federal lawmakers). The public, not surprisingly, believes that large donors to the parties have a major impact on the decisions of elected federal officials. Leon, 1291sa.

These concerns do not go away merely because the national party committees are nominally raising money for nonfederal activities. Money is fungible. If the party committees are able to raise and use soft money for some "nonfederal" purposes, they will have more hard money available to transfer to or spend in support of federal candidates and officeholders. For this reason, a soft money contribution to a national party committee–although earmarked for a nonfederal purpose–may nonetheless confer a benefit on federal candidates and officeholders. The ban on national parties raising and spending soft money prevents donors from circumventing contribution limits in this way. *Cf. Buckley v. Valeo*, 424 U.S. at 38 (upholding $25,000 limit on total contributions during an election cycle "to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party"). This provision of BCRA thus protects the integrity of federal officeholders and elections.

The soft money ban on federal candidates and officeholders. Title I similarly prevents federal candidates and officeholders from raising or spending soft money in connection with any election, state or federal. BCRA, tit. I, sec. 101(a), § 323(e), 116 Stat. at 84. Although federal officeholders remain free to solicit funds on behalf of state and local candidates, any sums raised must comply with federal contribution limits. Here, the federal interest is crystal clear.[3] Past

[3] Judge Henderson addressed this issue below and held that

experience shows that allowing federal officeholders to raise soft money leads to the appearance of corruption, because the donors gain, or appear to gain, increased access to federal officials. The purpose for which the soft money is raised does not matter. If a federal officeholder solicits soft money contributions, both potential donors and the public must reasonably assume that the contributions will benefit that officeholder in some way. *See* Kollar-Kotelly, 566sa (federal officeholders value donations to state political parties "almost as much as donations made directly to their campaigns"). The benefit to the federal officeholder is sufficient to lead to a risk of corruption or the appearance of corruption.

Restrictions on the use of soft money to fund "federal election activity" conducted by state and local parties. In addition to prohibiting the national parties and federal candidates and officeholders from raising or spending soft money, Title I restricts the use of soft money by state and local parties – but only to the extent that the money is used for "federal election activity." BCRA, tit. I, sec. 101(a), § 323(b), 116 Stat. at 82-83.[4] Federal election activities include communications that support or attack federal candidates as well as voter registration activity within

Congress has the power to regulate the solicitation and transfer of nonfederal funds by federal candidates and officeholders. Henderson, 452sa n.174.

[4] State and local parties and candidates may either use federal money for these purposes, or a mix of federal dollars and nonfederal dollars raised pursuant to the "Levin Amendment," BCRA, tit. I, sec. 101(a), § 323(b)(2), 116 Stat. at 83. The Levin Amendment loosens the soft money restrictions somewhat for voter registration, voter identification, and get out the vote activities.

120 days of a federal election, and voter identification, get out the vote, and party promotion activities conducted in connection with a federal election. BCRA, tit. I, sec. 101(b), § 301(20)(a), 116 Stat. at 85-86. Notably, although plaintiffs challenge these restrictions, they do not dispute that these activities are related to federal elections.[5]

In fact, all of these activities significantly affect federal elections and are subject to federal regulation. When parties register voters, and find ways to help voters reach the polls, the voters cast ballots for federal candidates. When voters are influenced in the weeks before a federal election by signs and campaign ads that urge them to "Vote Democratic" or "Vote Republican," they are influenced to vote for federal candidates. Congress previously attempted to regulate this kind of activity by allowing state parties to use a mix of federal and nonfederal money, but that approach proved to be a loophole through which substantial amounts of soft money were used to influence the outcome of federal elections. *See* Kollar-Kotelly, 493sa-501sa ("issue" advocacy); *id.* 525sa-

[5] The political party plaintiffs appear to argue that the Elections Clause gives Congress authority to regulate only those expenditures made "for the purpose of influencing" the outcome of a federal election. *See* Br. of Political Parties at 88. They cite no support for this proposition, however, and there is no logical reason that Congress's power should be defined by the purpose of an activity or expenditure, rather than by its effect. The McConnell plaintiffs complain about this provision because sometimes the federal elections in a particular jurisdiction are "actually or practically uncontested." Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 33. They fail to explain why the power of Congress to regulate categories of election activity should turn on the election dynamics of a particular jurisdiction in a given year.

527sa (get out the vote activity); *id.* 529-531sa (voter registration); *id.* 542sa ("national parties found a huge loophole through which to circumvent the federal campaign finance regime"). BCRA closes the loophole.

Communications by state candidates that support or oppose candidates for federal office. Under BCRA, a candidate for state office must use federal funds for communications that refer to a clearly identified candidate for federal office and promote, support, attack, or oppose the candidate for that office. BCRA, tit. I, sec. 101(a), § 323(f)(1), 116 Stat. at 85. In other words, if a state candidate wants to advocate for or against a federal candidate for office, the state candidate must use federal funds, just as the federal candidate would. Without this restriction, donors could easily evade the soft money limits by contributing to state candidates, who would use the money to support not only their own campaigns but also the campaigns of like-minded federal candidates.[6] The connection with federal elections is clear and direct, and thus Congress has authority to regulate in this manner.

Although plaintiffs challenge these elements of BCRA on federalism grounds, they nonetheless acknowledge that campaigns for federal and state elections are closely intermeshed. *See, e.g.*, Br. of Political Parties at 19-20 (describing Republican "Victory Plans" and Democratic "Coordinated Campaigns"). Taken in context, plaintiffs' complaint that Congress failed to respect the boundary between

[6] Plaintiffs further argue that federal candidates should be permitted to solicit soft money to be donated to state candidates, who could then use the funds to influence both the federal and state elections.

federal and state election activities cannot stand. As is evident, parties, candidates, and the voters respect no clear dividing line between such elections. When the political parties and candidates purposefully coordinate their efforts in federal and state elections, Congress can hardly be faulted for regulating federal elections in a manner that may impact some state and local activities. The overlap is neither avoidable nor unconstitutional.

C. BCRA, which regulates the financial transactions of private parties, does not impermissibly intrude on state sovereignty.

As important as what BCRA does is what BCRA does not do: it does not directly regulate the States in any way. The Act leaves untouched such matters as the timing of state elections, the structure of state government, the qualifications of state officeholders and voters, and the terms and duties of state officials. The degree of hyperbole found in the plaintiffs' briefs, and in the brief of the Amici States of Virginia, et al., might suggest otherwise. But, contrary to the assertion of these amici States supporting the plaintiffs, BCRA does not affect "a State's ability to have its own rules on how its own government will be chosen," nor does it "trump[] state campaign finance laws." Br. of Amici Curiae Virginia et al. at 2. Instead, the Act regulates the financial transactions of private parties.

A brief comparison of BCRA with the cases cited by plaintiffs and their amici promptly illustrates that BCRA stops far short of intruding on state sovereignty. In *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), the Court struck a federal statute that set a minimum voting age for state elections. In *Gregory v. Ashcroft*,

501 U.S. at 463-64, the Court similarly expressed doubt about the power of Congress to interfere with the "authority of the people of the States to determine the qualifications of their most important government officials." BCRA does not override any such state laws. Nor does it affect the conduct of voters in state elections. *Cf. Blitz v. United States*, 153 U.S. 308, 313-15 (1894). Other cases are even farther afield. BCRA does not regulate the workings of state government at all, so it certainly does not "commandeer" state officials or state legislatures, *see Printz*, 521 U.S. at 925 or abrogate state sovereign immunity, *see Alden v. Maine*, 527 U.S. 706, 712 (1999).

Also inapposite are the supposed examples of Congressional overreaching described by the plaintiffs. The political parties emphasize that the "Chairman of the [Republican National Committee]" cannot "send a fundraising letter on behalf of a *state* gubernatorial candidate or even a *local* mayoral candidate." Br. of Political Parties at 78. The McConnell plaintiffs cite this example of "severe" federal intrusion: federal officeholders, like Senator McConnell "will be prohibited from writing or calling donors to ask them to make donations . . . to state and local committees and candidates." Br. of Appellants/Cross-Appellees Senator Mitch McConnell et al. at 34. What plaintiffs describe are simply restrictions on the solicitation of money by certain private parties, not intrusions on the authority of States to regulate their own elections.

BCRA's restrictions on soft money regulate the financial transactions of private parties, not States. Congress created a set of rules to govern the financing of federal elections, not state elections. Admittedly, the two areas overlap, in large part because many States

thus far have chosen to hold their elections simultaneously with federal elections.[7] The power of Congress to regulate in this area, however, is not lessened by any incidental and unavoidable effect those regulations may have on state elections.

II. BCRA Serves The Interests Of The States And Their Citizens By Restoring Integrity To The National Political Process And Promoting Political Participation and Discourse.

Although Congress passed BCRA to reform the federal election process, the Act serves a goal that is vitally important to the States. It seeks to restore integrity to, and confidence in, the national political process of which all Americans are a part. As this Court has repeatedly recognized, "[d]emocracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) [hereinafter "*Shrink Missouri*"] (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)). By eliminating the flow of soft money through the political parties, and preventing corporations and unions from spending unlimited sums on sham "issue ads," BCRA is designed to remedy the "disaffection [and] distrust [that] has now spread to the entire political discourse." *Shrink Missouri*, 528 U.S. at 408 (Kennedy, J., dissenting). The States, like the federal government, must grapple with this national loss of

[7] States maintain the full authority as sovereigns to hold their elections at different times from federal elections.

faith in our democratic institutions. BCRA directly benefits the States and their citizens by (1) restoring faith in, and therefore participation in, the democratic process; and (2) ensuring that elected federal officials represent their constituents with loyalty and integrity.

Americans' confidence in their elected officials has been deeply shaken by the influence of money, real or apparent, on the outcomes of elections, access to government, and political decision-making. The record below contains substantial evidence that "the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence on, the officeholders of that party that the donor enjoys thereafter." Kollar-Kotelly, 626sa; Leon, 1289sa. Among the data before the court was a poll conducted by two prominent pollsters, Mark Mellman and Richard Wirthlin, *see* Leon, 1290sa, which found that "[a] significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials." Kollar-Kotelly, 627sa; Leon, 1291sa. The poll further found that *seventy-one percent* of Americans "think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or *even if it's not what they think is best for the country*." Kollar-Kotelly, 628sa; Leon, 1292sa (emphasis added).

It is crucial to the States that their citizens have faith in the democratic process. When the electorate perceives that federal elections or officeholders are corrupt, this perception taints the electorate's view of more than just the federal government. Such a

sentiment leads to cynicism, alienation and a pervasive loss of faith in all levels of government – federal, state and local. State and local governments, which depend on their citizens to serve on local boards and committees, run for municipal offices, volunteer for emergency services and participate in the obligations of democratic society, suffer sharply from such cynicism. As this Court has warned, "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."*Shrink Missouri*, 528 U.S. at 390; *see also United States v. Int'l Union UAW-CIO*, 352 U.S. 567, 575 (1957) (noting that ban on corporate contributions not only preserves the integrity of the electoral process but also "sustain[s] the active, alert responsibility of the individual citizen in a democracy").

The States also have a keen interest in the integrity and loyalty of federal officeholders elected to represent the interests of their citizens. The record documents the ways in which soft money has distorted the federal political process and has given large donors disproportionate access to federal officeholders. Curtailing the solicitation and spending of soft money will reduce the pressure on federal officeholders to respond to the interests of donors and allow these public officials to focus their time and attention on the needs of their constituents.

Removing the influence of "big money" not only promotes accountability, it invigorates political debate at the state and local level. Freeing the political parties of the race to raise and spend huge amounts of soft money in each federal election cycle will enable them

to refocus their efforts on political organizing at the state and local level, thereby giving ordinary Americans more opportunity to debate issues, meet candidates and participate in our national political process. BCRA is crucial to achieving this result.

III. The Ability Of The States To Protect The Confidence Of Their Citizenry In Their Own Elected State Officials Should Not Be Hobbled By The First Amendment Proscriptions Sought By Plaintiffs.

The Court should reject plaintiffs' view of the First Amendment, not only to uphold BCRA, but to preserve the ability of the States to enact and enforce their own campaign finance reforms. The plaintiffs view virtually every significant aspect of BCRA as facially invalid. If adopted, plaintiffs' constitutional vision would forever deny to the States the ability to enact broad categories of legislation,[8] thereby transforming the First Amendment into an imposed set of "judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion).

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[8] As an example, the McConnell plaintiffs argue that restrictions on contributions to political parties cannot be justified by the governmental interest in avoiding corruption or the appearance of corruption. Br. for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 20. Both the McConnell and political party plaintiffs argue that limits on contributions to political parties must withstand strict scrutiny. *Id.* at 17; Br. of Political Parties at 35-36. These views call into question not only section 101 of BCRA but also efforts by States to limit contributions to political parties.

The States seek to protect their ability to experiment with campaign finance reforms, because the States have a compelling interest in addressing the shared belief of many citizens that they have lost any meaningful voice in their own government. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("it is important to protect the integrity of the marketplace of political ideas"). A core attribute and function of the sovereignty of the Amici is the policing of their own elections.

This case implicates the continuing validity, and the future vitality, of myriad State campaign finance reforms and innovations that address corruption or the appearance of corruption in State elections. *See generally* 33 Council of State Governments, *The Book of the States* 174-232 (2000) (detailing campaign finance reform legislation passed by the States); http://www.fec.gov/pages/cfllaw2000.htm (visited July 30, 2003) (charting the current array of campaign finance legislation by the States). This Court should not effectively silence the medley of responses being played out in Statehouses across this nation. Instead, the Court should adopt a vision of the First Amendment that protects core freedoms while allowing the States to continue serving as "laboratories of democracy":

> [A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).[9]

Rather than enhancing state sovereignty, the plaintiffs seek to preclude the States from experimenting with meaningful campaign finance reform. As Judge Kollar-Kotelly recognized, the plaintiffs advance a view of the First Amendment that does not appear to "accept any restrictions whatsoever," even the contribution limits established as constitutional in *Buckley*. Kollar-Kotelly, 1008sa. The plaintiffs seek not to reform, but to repeal, this entire area of the law, cutting a wide constitutional swath that would eradicate a century of efforts to deal with the erosion of the public's faith in our institutions of democracy. If plaintiffs' view of the law prevails, "[t]he clock will be turned back to close to 100 years of incremental and balanced campaign finance regulation." Kollar-Kotelly, 1012sa-1013sa; *see also*

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[9]As Senator John Bankhead noted long ago:

> "We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue."

United States v. Int'l Union UAW-CIO, 352 U.S. at 577-78 (1957) (quoting 86 Cong.Rec. 2720).

Leon, 1083sa, 1101sa (noting that various of the positions urged by plaintiffs, if adopted, would be an "affront" to the existing regulatory system and "would make a mockery of existing Supreme Court precedent").

The plaintiffs' invocation of "federalism" in this case is nothing more than a political fig leaf. Plaintiffs seek to obscure the fact that their First Amendment arguments, if adopted, would foreclose meaningful state innovation across the political landscape of campaign finance law. Plaintiffs truly seek to restrict, not to preserve, state authority. Their arguments should be rejected.

CONCLUSION

For the foregoing reasons, the Court should uphold the constitutionality of the Bipartisan Campaign Reform Act.

Respectfully submitted,

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